Supreme Court, U.S.
FILED
FEB 22 2000
CLERK

(3)

No. 99-1218

In the Supreme Court of the United States

GANGI BROS. PACKING CO., ET AL.,
PETITIONERS,

v.

CARGILL, INCORPORATED,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

RICHARD J. FAVRETTO*
LAWRENCE S. ROBBINS
MARK W. RYAN
ROBERT L. BRONSTON
Mayer, Brown & Platt
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

**Counsel of Record*

Counsel for the Respondent

30pp

QUESTION PRESENTED

Whether the court of appeals correctly sustained the district court's grant of summary judgment because petitioners presented no evidence that would support a reasonable inference of respondent's participation in an unlawful conspiracy.

RULE 29.6 STATEMENT

Neither respondent Cargill, Incorporated nor any parent, subsidiary or affiliate has issued shares to the public.

TABLE OF CONTENTS

Page

QUESTION PRESENTED . . . . . (i)

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

BRIEF FOR THE RESPONDENT IN OPPOSITION . . 1

STATEMENT 2

REASONS FOR DENYING THE PETITION 9

A. The Court Of Appeals' Decision Applies Settled Law To The Facts Of This Particular Case And Does Not Conflict With Decisions Of This Court Or Of Any Other Circuit 10

B. Even If This Court Were Inclined To Revisit Otherwise Settled Principles Of Antitrust Conspiracy Law, This Case Presents An Inappropriate Vehicle In Which To Do So . . 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

American Council of Certified Podiatric Physicians & Surgeons v. *American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606 (6th Cir. 1999) 14

Blomkest Fertilizer, Inc. v. *Potash Corp. of Saskatchewan, Inc.*, slip op., no. 97-1330 (8th Cir. Feb. 17, 2000) (en banc) 14-15

City of Tuscaloosa v. *Harcros Chem., Inc.*, 158 F.3d 548 (11th Cir. 1999) 14

Clorox Co. v. *Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997) 14

Computer Identics Corp. v. *Southern Pacific Co.*, 756 F.2d 200 (1st Cir. 1985) 14

Corner Pocket of Sioux Falls, Inc. v. *Powerhouse Tech., Inc.*, No. 97-1097, 522 U.S. 1117 (1998) 18

Corner Pocket of Sioux Falls, Inc. v. *Video Lottery Tech., Inc.*, 123 F.3d 1107 (8th Cir. 1997) 14

Eastman Kodak Co. v. *Image Tech. Servs.*, 504 U.S. 451 (1992) 12, 13, 15, 17

Harcros Chemicals, Inc. v. *City of Tuscaloosa*, No. 98-1997, 120 S. Ct. 309 (1999) 18

In re Baby Food Antitrust Litig., 166 F.3d 112 (3d Cir. 1999) 14, 16-17

In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997) 17-18

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 906 F.2d 432 (9th Cir. 1990) 17, 19

TABLE OF AUTHORITIES — Continued

Page(s)

JTC Petroleum Co. v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999) 17-18

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) . . . . . *passim*

Mitchael v. *Instacorp, Inc.*, 179 F.3d 847 (10th Cir. 1999) 14

Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) 11, 12, 13

Moyer Packing Co. v. *Petruzzi's IGA Supermarkets Inc.*, No. 93-601, 510 U.S. 994 (1993) 18

Ostrzenski v. *Columbia Hosp. for Women Found., Inc.*, 158 F.3d 1289 (D.C. Cir. 1998) 14

Petruzzi's IGA Supermarkets, Inc. v. *Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993) 15, 16

Reserve Supply Corp. v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37 (7th Cir. 1992) 14, 17

Service & Training, Inc. v. *Data General Corp.*, 963 F.2d 680 (4th Cir. 1992) 14

Stewart Glass & Mirror, Inc. v. *U.S. Auto Glass Discount Centers, Inc.*, 200 F.3d 307 (5th Cir. 2000) 14

Super Sulky, Inc. v. *United States Trotting Ass'n*, No. 99-67, 120 S. Ct. 172 (1999) 18

United States v. *Wisniewski*, 353 U.S. 901 (1957) . . 17

Statutes and Rules

15 U.S.C. § 1 . . . . . *passim*

Fed. R. Civ. P. 56 . . . . . 19, 20

Fed. R. Evid. 201 8

TABLE OF AUTHORITIES — Continued

Page(s)

Miscellaneous

P. Areeda & H. Hovenkamp, ANTITRUST LAW (1995) 14

BRIEF FOR THE RESPONDENT IN OPPOSITION

In this case, the court of appeals unanimously affirmed the district court's conclusion that no reasonable jury could have found that respondent Cargill, Incorporated ("Cargill") participated in a price-fixing conspiracy in the citric acid industry. In their petition for certiorari, petitioners assert that the summary judgment standard applied by the court of appeals conflicts with decisions of this Court and of other courts of appeals, and that all four of the judges below erred in concluding that the evidence in the record failed to raise a genuine issue that Cargill participated in the conspiracy.

Petitioners' claims are entirely meritless. The court of appeals faithfully applied this Court's precedents, and its decision is not in conflict with decisions of any other Circuit. Nor are petitioners' factual claims of any substance. Thus, although petitioners invoke the importance of governmental enforcement of the antitrust laws (Pet. 12-13), they neglect to mention that the Antitrust Division of the Department of Justice — following an extensive investigation, spanning several years, in which it filed criminal charges against the members of the citric acid conspiracy, took guilty pleas from the companies and many of the individuals involved, and secured agreements to cooperate from all of the guilty parties — concluded that "Cargill was not involved in price-fixing in citric acid." See *infra*, pp. 6-8. The courts below did not err in concluding that no reasonable jury could believe otherwise.

Finally, and in any event, this case is a highly unsuitable vehicle for addressing the question presented. As the decisions of both courts below make clear, Cargill would have prevailed — and, indeed, *did* prevail in the district court — under precisely the legal standard for summary judgment that petitioners advocate. See *infra*, p. 19. Moreover, much of petitioners' contrary "evidence" is nowhere to be found in the summary judgment record — a

fact commented on by both courts below. The petition for certiorari should be denied.

STATEMENT

1. In 1990, Cargill entered the citric acid market by constructing a plant with an annual capacity of 56 million pounds. SER 425:2-3.[1] Upon entering the market, Cargill had a market share of 0%. By continuously expanding its capacity, by always producing as much citric acid as it could, and by selling out its entire volume of production, Cargill managed to achieve a U.S. market share of approximately 23% by 1995. SER 425:96, 118-119. Cargill's capacity and volume of actual production increased every year, and it sold every pound of citric acid that it produced. See Pet. App. A54.

Building its market share from 0% in 1990 to 23% in 1995 required Cargill to be an extraordinarily aggressive competitor. In internal documents filed under seal in the court of appeals, Cargill's competitors continuously bemoaned Cargill's competitiveness. See, *e.g.*, SER 426:166, 173, 183, 194, 197. As a result of its competitive tactics, Cargill increased its market share during every year between 1991 and 1995, the period during which the citric acid conspiracy operated. See Pet. App. A63.[2]

---

[1] Citations to the record refer to the Supplemental Excerpts of Record ("SER"), Conditional Cross-Request for Judicial Notice ("CRJN"), and the Opposition to Appellant's [Second] Request for Judicial Notice ("ORJN").

[2] Citing no evidence, petitioners assert that "Cargill's market share, which until 1993 had risen meteorically, dipped slightly and then remained flat." Pet. 4. The only evidence in the record is to the contrary, as the court of appeals recognized. See Pet. App. A20 ("there is no evidence in the record supporting [petitioners'] claim that Cargill's market share flattened after 1993"); *id.* A21 n.7 ("the only market share data actually in the record — and thus the only data properly before this court — indicates that Cargill's market share continued to increase even after 1993"); see also *infra*, p. 22.

2. The European Citric Acid Manufacturers Association ("ECAMA") is a trade association formed to promote the interests of the citric acid industry. It is organized under the European Chemical Industry Council ("CEFIC") and operates under European Union law. For the benefit of its members, ECAMA collects and aggregates data on the citric acid industry. As the court of appeals explained, "ECAMA collected figures on production and sales from each of its members, audited this information on an annual basis, and produced statistics aggregated by country on citric acid production and sales. ECAMA members reported production and sales information to an independent agent of ECAMA, who distributed information aggregated by country to members. The reason that only aggregate statistics were distributed was to preserve the confidentiality of individual members' sales and production figures." Pet. App. A14. These activities "served the legitimate purpose of informing members of worldwide citric acid conditions and were, in themselves, wholly legal." *Ibid.*

Because Cargill perceived many benefits to be derived from joining ECAMA, the General Manager of Cargill's citric acid business contacted a CEFIC official to obtain more information. Cargill was assured that ECAMA took pains to avoid any impropriety under the antitrust laws — it maintained strict confidentiality of individual company data, and a CEFIC representative was present at all meetings. SER 425:107-108. In an April 1993 memorandum to his superior and to in-house counsel, the Cargill General Manager carefully examined the costs and benefits of joining ECAMA, ultimately recommending that Cargill should join. SER 426:22A-24. Cargill joined ECAMA only after obtaining specific reassurances regarding the confidentiality of individual company statistics. SER 426:25-40.

3. After the United States announced that it was investigating illegality in the citric acid industry, petitioners sued every major producer of citric acid for violations of the

Sherman Act: Archer Daniels Midland ("ADM"), Haarman & Reimer ("H&R"), Hoffman-LaRoche ("HLR"), Jungbunzlauer ("JBL") and Cargill. While this case was proceeding, the United States prosecuted and secured guilty pleas from the guilty defendants: ADM, H&R, HLR and JBL. Those defendants also settled the civil claims against them. Petitioners continued to press their case against respondent Cargill, the sole remaining defendant.

Eager to obtain testimony from an actual conspirator, petitioners traded about $8 million from H&R's settlement in exchange for the deposition testimony of German citizen Hans Hartmann, President of H&R GmbH, who had previously entered an individual guilty plea to price-fixing in the citric acid industry. SER 426:198-212. In his testimony, Hartmann explained how the citric acid conspiracy worked. It consisted of high-level meetings by the "Masters" to allocate sales volumes and market shares, and to set list-price targets. SER 425:182-185, 188-190. Lower-level employees (the "Sherpas") met to implement the details of the conspiracy. The conspirators communicated monthly by telephone to exchange company-specific information regarding monthly sales figures. SER 425:186-187. The conspiracy was worldwide in scope, and the conspirators attempted to allocate market shares to within one-tenth of a percentage point. SER 425:192-193.

Most pertinently, Hartmann identified the participating members of the conspiracy as H&R, JBL, HLR, and ADM, which were termed the "group of four." SER 425:194-195, 210. Hartmann verified that no Cargill employee had ever attended a conspiratorial meeting. SER 425:209-210. Although he testified that the conspirators exchanged monthly sales data, Hartmann never received Cargill's individual figures. SER 425:186-187, 205-208.

Finally, Hartmann made clear that the conspiracy was "completely separate" from ECAMA. SER 425:210-212.

Although conspirators would occasionally arrange meetings a few days before or after ECAMA meetings, the conspiracy was always conducted outside ECAMA. SER 425:191, 195. Prices were never discussed at ECAMA meetings. SER 425:201.

4. After carefully reviewing all of the evidence — and explicitly relying on the very legal standard that petitioners advocate in this Court (see Pet. 11-12) — the district court held that "no reasonable jury could find that Cargill was a participant" in the citric acid price-fixing conspiracy. It therefore granted Cargill's summary judgment motion. Pet. App. A47-A66.

The court explained first that there was "convincing direct testimonial evidence that [Cargill] was not involved in the conspiracy." Pet. App. A52. By contrast, the court stated, there was no direct evidence of Cargill's participation in the conspiracy.[3] As for petitioners' "voluminous but weak circumstantial evidence" — "[a]pparently" submitted in the "hop[e] that quantity will substitute for quality" (Pet. App. A53) — the district court concluded that it simply did not "create a genuine issue of material fact." *Ibid.*

Focusing upon petitioners' primary theory of the case — that Cargill's membership in ECAMA was proof that it was part of the conspiracy — the court found that "[t]he evidence in no way supports plaintiffs' conspiracy theory about ECAMA." Pet. App. A55. The court conducted a similarly thorough review of the numerous other categories of evidence submitted by the petitioners, but concluded that

---

[3] The district court noted that "[u]nder normal circumstances no inference can be drawn from the lack of direct evidence" (Pet. App. A52). Nevertheless the court added, "[t]his case is different." Given that the conspirators had pled guilty to criminal charges of price fixing, and had cooperated with the government's investigation, "the utter lack of any direct evidence that Cargill was involved in that conspiracy is * * * quite probative." *Id.* at A53.

"plaintiffs are wrong" to suggest that their evidence could tend to show that Cargill participated in the citric acid price-fixing conspiracy. *Id.* at A49.

Applying the established summary judgment standard, the district court concluded that "even drawing all inferences in plaintiffs' favor, as the Court must, the evidence in this case fails to raise any genuine issue of fact that defendant Cargill was a member of the conspiracy to fix citric acid prices. Drawing an inference of conspiracy from the evidence proffered by plaintiffs would require the sort of speculation and guesswork that the Court is forbidden to undertake." Pet. App. A65. Because "no reasonable jury could, on the basis of this record, conclude that defendant Cargill was a member of the conspiracy," the court granted Cargill's motion for summary judgment. *Id.* at A66.

5. Petitioners filed a notice of appeal. At the same time, petitioners requested that the court of appeals take judicial notice of the fact that a small Italian producer called Cerestar had recently pled guilty to participating in the citric acid price-fixing conspiracy.

Cargill did not oppose petitioners' request, but it conditionally cross-requested that, if the court of appeals were to take judicial notice of the Cerestar plea proceedings, it should also take judicial notice of other proceedings that put the Cerestar plea in context. During August of 1998, the United States was conducting a criminal prosecution of three ADM executives for price fixing in the lysine industry. Attempting to show that the defendants in that case had patterned the lysine conspiracy after the citric acid conspiracy, the United States called Barrie Cox to testify about the nature of the citric acid conspiracy. Barrie Cox, also an ADM employee, had received immunity from the government by promising full cooperation in its investigation. Cox was uniquely qualified to provide a definitive account of the citric acid conspiracy. Cox operated as both a "Master" and

a "Sherpa" (CRJN, Ex. A, at 2770-2771, 2798-2799), and he testified that he attended "pretty well" every single one of the more than thirty conspiratorial meetings. *Id.* at 2769.

When the attorney for the United States asked him — point blank — whether Cargill was in the conspiracy, Cox testified that Cargill was not a member:

> Q. Mr. Cox, can you name the companies that participated in the citric acid price-fixing and volume allocation conspiracy?
>
> A. Archer Daniels Midland, Haarman & Reimer, Hoffman-LaRoche, Jungbunzlauer, and Cerestar.
>
> * * *
>
> Q. And by the way, the company Cargill was a citric acid producer also, wasn't it?
>
> A. Yes, it was.
>
> Q. And I take it they were not part of the conspiracy?
>
> A. That is correct.

CRJN, Ex. A, at 2617-2618, 2674-2675.[4]

After the case had been fully briefed and argued in the court of appeals, petitioners submitted a second request for judicial notice. In the new request, petitioners sought to have the court take judicial notice of triple-hearsay assertions contained in an FBI report memorializing an interview that had been conducted with Barrie Cox in October 1996 at an early stage of the government's investigation. Cargill opposed that request, pointing out (1) that Cox had testified under oath that Cargill was not a member of the conspiracy,

---

[4] Petitioners note that "Cargill requested that the Court of Appeals take judicial notice of new evidence developed in connection with the criminal cases" (Pet. 7), but they do not disclose that the evidence in question is precisely the Cox testimony quoted in text.

(2) that the contents of the report were triple hearsay and therefore inadmissible, (3) that the contents of the report were subject to reasonable dispute, and therefore not a proper subject for judicial notice under Fed. R. Evid. 201, and (4) that the statements attributed to Cox in the report lacked probative value in light of the government's repeatedly stated conclusion that "Cargill was not involved in price-fixing in citric acid." ORJN, Ex. B, at 5609. Indeed, in response to petitioners' attempt to rely on the FBI report, the government took the extraordinary step of writing a letter to Cargill's counsel confirming that Cargill and the Cargill employee mentioned in the report were "neither targets of, nor currently under investigation in, the Antitrust Division's investigation of possible criminal antitrust violations in the citric acid industry." *Id.*, Ex. A.

6. The court of appeals unanimously affirmed the judgment of the district court. Pet. App. A1-A32. The court recognized that it was "obligated to construe the evidence in the light most favorable to the non-moving party, to give the non-moving party the benefit of all reasonable inferences, and to refrain from making credibility determinations." *Id.* at A5. Nevertheless, the court agreed with the district court that petitioners' factual submissions simply could not survive summary judgment. *Id.* at A28-A29. The court found, first, that "there is no evidence to support [petitioners'] theory that these [ECAMA] meetings were used to pursue illegal ends." Pet. App. A11. Although the conspirators met at illegal meetings that were "often in the same city as, and within a few days of, officially scheduled ECAMA meetings[,] there is no evidence that illegal activities took place during ECAMA meetings attended by Cargill representatives. Nor is there evidence that Cargill participated in any of the 'unofficial' meetings." *Id.* at A11-A12.

The court next rejected petitioners' argument that "Cargill's failure to expand its production capacity more rapidly than it did constitutes circumstantial evidence that it

was conspiring to fix prices." Pet. App. A18. In addition to the fact that such an argument "does not fit with [petitioners'] theory of the conspiracy" (*ibid.*), the court pointed to the uncontroverted evidence in the record that "Cargill *did* expand rapidly." *Id.* at A19 (emphasis in original).

The court therefore concluded that "[c]onsidered as a whole, the evidence in the record * * * does not support a reasonable inference that *Cargill* was involved in the citric acid price fixing conspiracy." Pet. App. A29 (emphasis in original). Indeed, the court added, "there is no more than a scintilla of evidence that Cargill was a participant in the citric acid conspiracy" (*ibid.*).[5]

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is a fact-bound evaluation of the sufficiency of a summary judgment record in what the court of appeals found to be a "unique" case governed by settled legal principles. Moreover, the decision of the court of appeals is indisputably correct. All four judges to have fully evaluated the record in this case have concluded that there is no evidence that could support a verdict in petitioners' favor. And when petitioners sought rehearing en banc in the Ninth Circuit, not one judge of that large court so much as requested the filing of a brief in response to petitioners' request.

Nor does the court of appeals' decision in this case conflict either with this Court's precedents or with the decision of any other court of appeals. In fact, the court below cited cases from virtually every circuit (including the

---

[5] The court of appeals declined to decide petitioners' motion for judicial notice of the FBI report. The court noted that "[t]he arguments offered by Cargill against [petitioners'] request for judicial notice possess considerable force" (Pet. App. A27), but it ultimately concluded that it "need not resolve the dispute over whether judicial notice of this evidence would be proper" (*ibid.*) because "the documents [petitioners] seek[] to add to the record would not change the result in this case * * *." *Ibid.*

two courts with which petitioners assert a conflict) in support of the legal standard it applied. And, as the unanimity of the district court and the three judges of the court of appeals suggests, application of the governing standard to the facts of this case is not a controversial issue. In fact, both decisions below make clear that Cargill would be entitled to summary judgment even under the standard proposed by petitioners. The petition for certiorari should be denied.

A. The Court Of Appeals' Decision Applies Settled Law To The Facts Of This Particular Case And Does Not Conflict With Decisions Of This Court Or Of Any Other Circuit

1. Petitioners ask this Court to address the question "whether *Matsushita's* special summary judgment standard applies in cases where * * * the antitrust claim asserted by the plaintiff is neither implausible nor based on conduct by the defendant that is inherently procompetitive." Pet. i. In posing that question, petitioners fundamentally misread the *Matsushita* decision. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), did not impose a "special summary judgment standard"; rather, it articulated a rule of substantive antitrust law: "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Id.* at 588. Thus, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Ibid.* (citation omitted, internal quotation marks omitted). It is ***that*** rule — the "tends to exclude" rule which applies exclusively to § 1 cases alleging an illegal conspiracy — with which petitioners disagree. This Court made clear in *Matsushita*, however, that the "tends to exclude" rule is one

of substantive "antitrust law" (*ibid.*), not a procedural rule governing the summary judgment standard.

Nor is it true, as petitioners suggest (Pet. 18), that the "tends to exclude" rule applies only when plaintiffs allege the existence of a conspiracy that is facially implausible. It is true that, on the facts of *Matsushita*, the "petitioners had no motive to enter into the alleged conspiracy." 475 U.S. at 595. But this Court's precedents definitively establish that the "tends to exclude" rule applies to all § 1 cases — plausible and implausible alike.

The first and most important confirmation that the "tends to exclude" rule applies to plausible conspiracies can be found in the case that first articulated the rule — a case that petitioners fail to cite anywhere in their petition. Two years before *Matsushita*, this Court decided *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). *Monsanto* involved allegations of a wholly plausible conspiracy between a manufacturer and its distributors to fix the resale price of the manufacturer's products. A terminated distributor alleged that its distributorship had been terminated because it had engaged in price cutting. As support for its claim, the distributor showed that it had been terminated following pricing complaints by other distributors to Monsanto. Concerned that allowing antitrust liability to be predicated on such ambiguous evidence "could deter or penalize perfectly legitimate conduct" (*id.* at 763), the Court held that "something more * * * is needed." *Id.* at 764. It was in that context of a plausible conspiracy that the Court first articulated the rule that "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Ibid.*

Given the origin of the "tends to exclude" rule, there could have been very little doubt that the rule applied to facially plausible conspiracies. Nevertheless, because of the odd factual context of *Matsushita*, the Court took special

pains in that case to ensure that no one could possibly interpret its holding as limiting the rule to implausible conspiracies:

> We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in [*Monsanto*] establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

Matsushita, 475 U.S. at 597 n.21. *Monsanto* and *Matsushita* therefore leave no room for doubt that the rule requiring an antitrust plaintiff alleging a conspiracy in a § 1 case to provide evidence that tends to exclude the possibility of independent action applies in ***all*** cases, not just those alleging implausible conspiracies.

2. Despite petitioners' claims to the contrary (Pet. 17-18), this Court's decision in *Eastman Kodak Co.* v. *Image Tech. Servs.*, 504 U.S. 451 (1992), did not alter the rule in *Monsanto* and *Matsushita*. Nor could it have, for the question of conspiratorial versus independent conduct was not even presented in that case, which involved allegations that Kodak had illegally tied Kodak service to Kodak parts and had monopolized the service market for certain Kodak equipment. True, the Court in *Kodak* stated that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Kodak*, 504 U.S. at 468. But that remark referred not to *Matsushita*'s discussion of § 1 conspiracy law, but to its discussion of the application of settled summary judgment principles. *Matsushita* had announced the "settled principle[] that if the factual context renders respondents' claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persua-

sive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587. Kodak had argued that it was entitled to the benefit of that rule. See *Kodak*, 504 U.S. at 467 ("according to Kodak, * * * the existence of market power in the service and parts markets absent power in the equipment market simply makes no economic sense") (internal quotation marks omitted). In addressing that argument, the Court in *Kodak* explained that *Matsushita* had not changed settled summary judgment law; it "did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." *Id.* at 468 (emphasis in original). Thus, upon finding that Kodak's economic theory did not reflect the reality of the marketplace, the Court was obligated to affirm the Ninth Circuit's reversal of the summary judgment in Kodak's favor.

But the Court never even addressed, let alone purported to disturb, the settled rule of antitrust law in § 1 cases that plaintiffs must present evidence that "tends to exclude the possibility" of independent action. That phrase does not appear in the Court's opinion — which is not surprising, because the issue of the existence of a conspiracy was not even presented to the Court in *Kodak*.

That is precisely what the court below recognized when petitioners sought rehearing under the theory that its decision was in conflict with *Kodak*. The court explained that "*Kodak* was not concerned with the sufficiency of evidence of conspiratorial acts alleged under § 1 of the Sherman Act," and that it could not possibly have overruled the "tends to exclude" rule of *Monsanto* and *Matsushita*. Pet. App. A68. Petitioners challenge that distinction (Pet. 22), but it is quite plainly correct. Whereas *Kodak* addressed the standard for summary judgment in an antitrust case, *Monsanto* addressed the limits that substantive antitrust law places on the inferences to be drawn from ambiguous evidence. Whether

antitrust law permits a given inference to be drawn is quite different from applying the summary judgment standard to determine whether that inference is one that a reasonable jury might reach.

3. Petitioners contend, finally, that the courts of appeals are in conflict on the question whether the "tends to exclude" rule applies only to facially implausible conspiracies. See Pet. 22-30. That is simply not so. In fact, every single circuit has quoted and faithfully applied the "tends to exclude" rule in § 1 conspiracy cases. See, *e.g.*, *Computer Identics Corp.* v. *Southern Pacific Co.*, 756 F.2d 200, 203 (1st Cir. 1985); *Clorox Co.* v. *Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999); *Service & Training, Inc.* v. *Data General Corp.*, 963 F.2d 680, 685 (4th Cir. 1992); *Stewart Glass & Mirror, Inc.* v. *U.S. Auto Glass Discount Centers, Inc.*, 200 F.3d 307, 2000 WL 6157, *3 (5th Cir. Jan. 6, 2000); *American Council of Certified Podiatric Physicians & Surgeons* v. *American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 619 (6th Cir. 1999); *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 49 (7th Cir. 1992); *Corner Pocket of Sioux Falls, Inc.* v. *Video Lottery Tech., Inc.*, 123 F.3d 1107, 1112 (8th Cir. 1997); Pet. App. A5; *Mitchael* v. *Instacorp, Inc.*, 179 F.3d 847, 858 (10th Cir. 1999); *City of Tuscaloosa* v. *Harcros Chem., Inc.*, 158 F.3d 548, 570 (11th Cir. 1999); *Ostrzenski* v. *Columbia Hosp. for Women Found., Inc.*, 158 F.3d 1289, 1290 (D.C. Cir. 1998). The leading commentators are also in agreement. See II P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 322, at 70-72 (1995) ("when the evidence is in equipoise * * * summary judgment will be granted [to the defendant]").[6]

---

[6] On February 17, 2000, the Eighth Circuit issued an en banc opinion that further illustrates the uniform acceptance of the "tends to exclude" rule. See *Blomkest Fertilizer, Inc.* v. *Potash Corp. of Saskatchewan, Inc.*, no. 97-1330. In that case, the Eighth Circuit

The Third Circuit's decision in *Petruzzi's IGA Supermarkets, Inc.* v. *Darling-Delaware Co.*, 998 F.2d 1224 (1993), is fully in accord. In that case, the court of appeals reversed the district court's grant of summary judgment as to two of the three defendants on facts far removed from the present case. It is true that the court engaged in a discussion of *Matsushita*, and it cited the *Kodak* decision during that extensive discussion. See *id.* at 1230-1233. But there is no hint that the Third Circuit thought that *Kodak* had worked a dramatic change in antitrust conspiracy law. Indeed, the court flatly rejected the contention — on which petitioners

---

affirmed summary judgment for the defendants in a § 1 conspiracy case. Although the court split 6-5 on the application of the governing standard to the facts of that case, the decision confirms the consistency of the law in this area. Three features about the opinion make it significant in evaluating petitioners' claims. First, both the majority and dissent agreed that the governing legal standard was the "tends to exclude" rule. Compare slip op. at 6 ("In order to state a section 1 case, plaintiffs must present evidence that tends to exclude the possibility of independent action by the defendants.") (internal quotation marks omitted) with *id.* at 32 ("The question is whether the additional evidence tends to exclude the possibility that the producers acted independently.") (dissenting opinion of John R. Gibson, J.). Second, neither the majority nor the dissent so much as cited this Court's decision in *Kodak* — a fact that confirms the court of appeals' conclusion in this case that *Kodak* is not relevant to the "tends to exclude" rule. Finally, the opinion underscored the uncontroversial nature of the holding in this case. Even the dissent recognized that this case involves nothing more than the routine application of established summary judgment principles:

> The court * * * concluded the case by saying that there was no more than a scintilla of evidence that Cargill participated in the conspiracy. ***In re Citric Acid* is therefore consistent with the ordinary summary judgment standard in cases requiring a preponderance of evidence, and it does not stand for the proposition that a heightened standard of proof is necessary to survive summary judgment in antitrust cases.**

Id. at 39 (dissenting opinion of John R. Gibson, J.) (citation omitted) (bold emphasis added).

now rely — that antitrust plaintiffs alleging a facially plausible conspiracy should be freed from the "tends to exclude" rule:

> [T]he mere facts that a plaintiff alleges a plausible conspiracy and that that allegation does not threaten to chill procompetitive behavior do not mean that there are no restrictions on the inferences that can be drawn from the evidence it puts forward. * * * Instead, in a conscious parallelism case, a plaintiff also must demonstrate the existence of certain "plus" factors, for ***only when these additional factors are present does the evidence tend to exclude the possibility that the defendants acted independently***.

Id. at 1232 (emphasis added).

That is the very standard employed by the court of appeals in this case. Although the *Petruzzi* court reversed the summary judgment as to two of the defendants before it on a radically different factual record, the two courts employed the same legal test. Compare *id.* at 1228 (affirming grant of summary judgment as to third defendant because "we agree that the evidence put forward does not tend to exclude the possibility that Standard acted independently") with Pet. App. A28-A29 (affirming grant of summary judgment for Cargill because "[c]onsidered as a whole, the evidence in the record * * * does not tend to exclude the possibility that Cargill acted independently").

Were there any lingering doubt about the matter, the Third Circuit has much more recently decided an antitrust conspiracy case in which it affirmed summary judgment for the defendant on a record considerably more favorable to the plaintiffs than the one in this case. See *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999). In that case, there was evidence that sales representatives of competing firms had exchanged future price information with each other (*id.* at 119), and that the defendants obtained advance notice

of each other's price increases. *Ibid.* Nevertheless, the Third Circuit affirmed the summary judgment for the defendants, in part because "no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons" (*id.* at 122), and in part because the plaintiffs "failed to produce sufficient circumstantial evidence to prove concerted collusion that tends to exclude the possibility of independent action." *Id.* at 138. There simply is no conflict between the Third and Ninth Circuits on this issue.[7]

Petitioners come no nearer the mark in their claim that the Seventh Circuit applies a conflicting legal standard. To the contrary, in its post-*Kodak* decision of *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37 (7th Cir. 1992), the Seventh Circuit emphasized that "there must be evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Id.* at 49 (internal quotation marks omitted). Neither *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), nor *JTC Petroleum Co.* v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999), holds otherwise. Rather, in each of those cases Chief Judge Posner, writing for the court, addressed the plausibility of the alleged conspiracy only because the defendants had specifically argued that they

---

[7] In attempting to augment their alleged circuit conflict, petitioners emphasize what they deem an "intracircuit conflict" (Pet. 26) within the Ninth Circuit, asserting that this case conflicts with *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990). Petitioners claim that the Ninth Circuit's decision not to follow certain dicta in *Petroleum Products* was "ill-considered and incorrect." Pet. 9 n.6. Of course, petitioners raised that exact claim in their petition for rehearing en banc in the Ninth Circuit, and no judge of that court even requested that a responsive brief be filed. Moreover, even if an intracircuit conflict existed, that would be no argument for a grant of certiorari here. See *United States* v. *Wisniewski*, 353 U.S. 901 (1957).

were entitled to summary judgment on the basis that the conspiracy made no economic sense. See 123 F.3d at 614 (addressing defendants' argument "that summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation makes no economic sense"); 190 F.3d at 778. The fact that the court concluded that the conspiracy in those cases did make economic sense — and that the defendants were accordingly not entitled to summary judgment on that basis — does nothing either to cabin the "tends to exclude" rule or to conflict with the decision here.[8]

In short, the courts of appeals apply the "tends to exclude" rule in the same way; there is no circuit conflict regarding the legal standard. That is perhaps one reason why this Court has denied the numerous petitions citing the same false conflict that petitioners rely on here. See, *e.g.*, *Moyer Packing Co.* v. *Petruzzi's IGA Supermarkets Inc.*, No. 93-601, 510 U.S. 994 (1993); *Corner Pocket of Sioux Falls, Inc.* v. *Powerhouse Tech., Inc.*, No. 97-1097, 522 U.S. 1117 (1998); *Harcros Chemicals, Inc.* v. *City of Tuscaloosa*, No. 98-1997, 120 S. Ct. 309 (1999); *Super Sulky, Inc.* v. *United States Trotting Ass'n*, No. 99-67, 120 S. Ct. 172 (1999). The petition for a writ of certiorari should be denied here as well.

B. Even If This Court Were Inclined To Revisit Otherwise Settled Principles Of Antitrust Conspiracy Law, This Case Presents An Inappropriate Vehicle In Which To Do So

This case is an unsuitable vehicle for reconsidering the "tends to exclude" rule for at least two reasons. First,

---

[8] Citing an unpublished decision from the Fourth Circuit, petitioners also state that that court has adopted an aberrant standard. Again, they are taking snippets of language out of context; the Fourth Circuit applies the "tends to exclude" rule in the same way every other court does.

although the court of appeals cited and faithfully applied the rule in this case, it is quite clear from its opinion, and from the opinion of the district court, that summary judgment would have been granted to Cargill and affirmed even if the "tends to exclude" rule had never existed. Second, because petitioners rely extensively upon materials outside the record, resolution of this case would embroil this Court in an array of collateral issues regarding the admissibility of several pieces of evidence.

1. Although petitioners quibble with application of the "tends to exclude" rule in this case, they have not demonstrated that the result would have been any different if the courts below had applied the rule of law they advocate in this Court. In fact, the record amply demonstrates that the issue set forth in the petition is not truly presented here; Cargill clearly would be entitled to judgment as a matter of law under the standard articulated by the petitioners.

Indeed, the district court — believing that it was bound by the dicta in *Petroleum Products* — applied the very rule of law sought by petitioners here, and concluded that Fed. R. Civ. P. 56 mandated entry of summary judgment in Cargill's favor. See, *e.g.*, Pet. App. A47 ("no reasonable jury could find that Cargill was a participant" in the citric acid price-fixing conspiracy); *id.* at A53 ("plaintiffs' evidence is insufficient to create a genuine issue of material fact"); *id.* at A65 ("even drawing all inferences in plaintiffs' favor, as the Court must, the evidence in this case fails to raise any genuine issue of fact that defendant Cargill was a member of the conspiracy to fix citric acid prices"); *ibid.* ("Drawing an inference of conspiracy from the evidence proffered by plaintiffs would require the sort of speculation and guesswork that the Court is forbidden to undertake."); *id.* at A66 ("no reasonable jury could, on the basis of this record, conclude that defendant Cargill was a member of the conspiracy").

That conclusion is confirmed by the opinion of the court of appeals. Although the Ninth Circuit applied this Court's "tends to exclude" rule, its decision leaves no doubt that the court of appeals would have reached the same result in the absence of the rule. See, *e.g.*, Pet. App. A4 ("the essential question in this case is whether [petitioners'] circumstantial evidence is sufficient to permit a reasonable factfinder to conclude that Cargill was a participant in the citric acid conspiracy"); *id.* at A11 ("the crucial question is whether all the evidence considered as a whole can reasonably support the inference that Cargill conspired with the admitted conspirators to fix prices"); *id.* at A28 ("none of the various pieces of evidence offered by [petitioners] supports a reasonable inference that Cargill conspired to fix prices"); *id.* at A29 ("[c]onsidered as a whole, the evidence in the record * * * does not support a reasonable inference that *Cargill* was involved in the citric acid price fixing conspiracy") (emphasis in original). In the final analysis, the court of appeals was forced to conclude that "there is no more than a scintilla of evidence that Cargill was a participant in the citric acid conspiracy." *Ibid.*

In the end, all four judges that have reviewed the record in this case unanimously concluded that summary judgment for Cargill was warranted — not simply because of the "tends to exclude" rule, but also because of the plain language of Rule 56. Not a single member of the en banc court voted to rehear this issue, notwithstanding petitioners' presentation of the very same arguments now raised in the petition for certiorari. There simply is no version of the summary judgment test under which the evidence in this record would entitle petitioners to a jury trial.

2. It may be added that petitioners' factual quarrel with the two lower courts rests primarily on two pieces of "evidence" that are not even in the summary judgment record. Petitioners evidently believe that their presentation of the legal issues depends on this Court's consideration of

both pieces of proof. That is yet another reason why this case would be an inappropriate vehicle in which to reconsider the "tends to exclude" rule.

Petitioners rely most heavily upon the FBI report, which they also include in the appendix to the petition. In that report, created early in the government's investigation, an FBI agent wrote down his impressions of what ADM conspirator Barrie Cox said that a Cargill employee said to him during various phone conversations. The document itself confirms that Cargill was not in the citric acid conspiracy, but petitioners cite it as purported evidence of bid rigging at certain accounts. Petitioners decline, however, to reveal many relevant facts concerning the document. First, they omit to mention that the document was never submitted to the district court, and that it was provided to the court of appeals only after oral argument had taken place. Second, petitioners do not explain what exceptions could possibly allow the triple-hearsay statements on which they rely to be considered as evidence. Third, they do not reveal that the government itself, after full investigation, repudiated the report by concluding that "Cargill was not involved in price-fixing in citric acid" (ORJN, Ex. B, at 5609). The government also took pains to confirm that Cargill and the Cargill employee mentioned in the report were "neither targets of, nor currently under investigation in, the Antitrust Division's investigation of possible criminal antitrust violations in the citric acid industry." *Id.*, Ex. A. Finally, they do not reveal that the court of appeals did not grant their motion to supplement the record with or to take judicial notice of the document. Although the court acknowledged that Cargill's arguments against petitioners' motion "possess considerable force" (Pet. App. A27), the court declined to resolve petitioners' motion because "the documents [petitioners] seek[] to add to the record would not change the result in this case." *Ibid.*

Petitioners also rely heavily on their allegation that "Cargill's market share, which until 1993 had risen meteorically, dipped slightly and then remained flat." Pet. 4. According to the petitioners, Cargill's declining market share is evidence that it became a citric acid conspirator by joining ECAMA. Not only is there no evidence in the record to support this factual assertion, but both the district court and the court of appeals emphatically rejected it.

The district court expressly found that "[t]he evidence * * * indicates that although the growth rate of Cargill's market share slowed during the years of the conspiracy, the share nevertheless increased more than two percent between 1993 and 1995." Pet. App. A64. The court of appeals likewise found that "there is no evidence in the record supporting [petitioners'] claim that Cargill's market share flattened after 1993." *Ibid.* To the contrary, "the only market share data actually in the record — and thus the only data properly before this court — indicates that Cargill's market share continued to increase even after 1993." *Id.* at A21 n.7.[9]

Because petitioners' claim rests so heavily upon material outside the record, this case would inevitably enmesh the Court in a tangle of entirely collateral evidentiary matters. For that reason as well, the petition should be denied.

---

[9] Of course, even if the record evidence supported petitioners' market share claim, that would be of no avail because, as the court of appeals noted, "it is not reasonable to infer that a firm is engaging in illegal activities merely from the fact that it failed to continue to increase market share." Pet. App. A19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RICHARD J. FAVRETTO*
LAWRENCE S. ROBBINS
MARK W. RYAN
ROBERT L. BRONSTON
Mayer, Brown & Platt
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

**Counsel of Record*

Counsel for the Respondent

FEBRUARY 2000